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No. 88-1532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UTILITY INDUSTRY RESPONDENTS IN OPPOSITION

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May 19, 1989

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QUESTION PRESENTED

Whether a trade association of firms engaged in the treatment of hazardous wastes has prudential standing to challenge agency action under the Resource Conservation and Recovery Act where the alleged error is the Environmental Protection Agency's failure to impose more stringent or costly regulatory requirements on the treatment firms' competitors and potential customers and the alleged injury is potential competitive loss or failure to create market opportunities for the association's members.

PARTIES TO THE PROCEEDING BELOW

The intervenors in No. 86-1143 below and thus respondents in this Court (Sup. Ct. R. 19.6) are the following associations and individual electric utility companies* (collectively referred to as "utility industry respondents"):

Edison Electric Institute
National Rural Electric Cooperative Association
American Public Power Association
American Electric Power Service Corporation and its affiliates:
- Appalachian Power Company
- Columbus Southern Power Company
- Indiana Michigan Power Company
- Ohio Power Company

Atlantic City Electric Company
Baltimore Gas & Electric Company
Boston Edison Company
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central & South West Services, Inc.
Cincinnati Gas & Electric Company
Commonwealth Edison Company
Consolidated Edison Company of New York, Inc.
Dayton Power & Light Company
Delmarva Power and Light Company
Duke Power Company
Duquesne Light Company
Florida Power & Light Company
Gulf States Utilities Company
Houston Lighting & Power Company

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* The list of corporate affiliates required by Sup. Ct. R. 28.1 appears in the appendix to this brief.

Illinois Power Company
Indianapolis Power & Light Company
Iowa Power & Light Company
Iowa Public Service Company
Jersey Central Power & Light Company
Madison Gas & Electric Company
Minnesota Power & Light Company
Monongahela Power Company
Montaup Electric Company
New England Power Company
New York State Electric & Gas Corporation
Niagara Mohawk Power Corporation
Northern Indiana Public Service Company
Ohio Edison Company
Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
Pacific Gas & Electric Company
PacifiCorp dba Pacific Power & Light Company and
Utah Power & Light Company
Pennsylvania Power & Light Company
Philadelphia Electric Company
Potomac Electric Power Company
Public Service Company of Indiana, Inc.
Public Service Electric & Gas Company
Southern California Edison Company
Southern Company Services, Inc. and its affiliates:
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Tampa Electric Company
Texas Utilities Electric Company
The Cleveland Electric Illuminating Company
The Detroit Edison Company
The Potomac Edison Company

Toledo Edison Company
Union Electric Company
Virginia Electric & Power Company
West Penn Power Company
Wisconsin Electric Power Company
Wisconsin Power & Light Company
Wisconsin Public Service Corporation

Edison Electric Institute is the national association of investor-owned electric utility companies and acts as spokesman for those firms on subjects of national interest. The National Rural Electric Cooperative Association is the national association of rural electric cooperatives, with a membership in excess of 1,000, serving 25 million people in 46 states. The American Public Power Association is the national association of publicly-owned utilities. These associations are joined by 62 electric utility companies which collectively generate and distribute electricity to communities throughout the United States. Together, these utility companies and the members of the three associations serve more than 95 percent of the nation's consumers of electricity.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UTILITY INDUSTRY RESPONDENTS IN OPPOSITION

STATEMENT

Respondents Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and 62 individual utility companies (collectively "utility industry respondents") join with respondent Environmental Protection Agency ("EPA") in urging the Court to deny the petition for certiorari filed by petitioner Hazardous Waste Treatment Council. Because we substantially agree with

the Solicitor General in his opposition to certiorari, it is unnecessary to duplicate the Solicitor General's arguments in this brief, but we submit supplementary arguments directed primarily to No. 86-1143 (Pet. App. 1a-29a), the case below in which the utility industry respondents were parties.

A. Congress enacted the Resource Conservation and Recovery Act ("RCRA") in 1976 in response to the nation's increasing concern over the management and disposal of hazardous waste. Pub. L. No. 94-580, 90 Stat. 2795 (1976). The Act has two basic purposes: (1) to promote recovery and reuse of waste products, and (2) to establish regulatory mechanisms for managing wastes. RCRA § 1003(a), 42 U.S.C. § 6902(a). The latter goal is governed primarily by two subtitles of the Act. Subtitle C establishes a comprehensive "cradle-to-grave" scheme for regulating hazardous waste management and disposal practices,[1] while Subtitle D establishes a regulatory program for nonhazardous wastes.[2] In 1980 and again in 1984, Congress adopted significant amendments to RCRA.[3]

To implement Subtitle C, EPA since 1980 has promulgated massive regulations which govern virtually every aspect of hazardous waste management. *See* 40 C.F.R. Parts 260-72. The imposition of technically complex and costly regulations in turn has spawned a commercial waste management industry which provides off-site management services to generators of

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[1] *See* RCRA §§ 3001-19, 42 U.S.C. §§ 6921-39a.

[2] *See* RCRA §§ 4001-10, 42 U.S.C. §§ 6941-49a.

[3] Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980); Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984).

hazardous wastes who do not manage their own wastes. Petitioner represents the segment of that industry which provides treatment services for hazardous wastes. Pet. 3.

Although RCRA requires firms engaged in the treatment, storage or disposal of hazardous wastes to obtain a permit (RCRA § 3005(a), 42 U.S.C. § 6925(a)), any firm that demonstrates compliance with the performance and design criteria of the statute and regulations may receive a permit to manage its own wastes or the wastes of others.[4] *See* RCRA § 3005(c), 42 U.S.C. § 6925(c). As a practical matter, however, the increasing complexity and cost of compliance with EPA's rules has made it impractical and often economically impossible for small and even medium sized firms to manage their own wastes. Moreover, as Congress has limited the options for disposal of hazardous waste (*see* RCRA § 3004(b)-(g), 42 U.S.C. § 6924(b)-(g)), many generators of these wastes have turned to the commercial waste management industry, including petitioner's members, to dispose of their wastes in a manner consistent with regulatory requirements. As EPA limits the available management options or imposes costly design requirements for management facilities, fewer firms remain able to manage their own wastes.

Because the commercial hazardous waste management business has become increasingly lucrative for firms capable of meeting the EPA regulatory standards, petitioner has a powerful economic incentive to advocate even more complex and costly regulatory

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[4] RCRA's primary mission is to protect human health and the environment. *See, e.g.*, RCRA §§ 1003(a)(1),(4),(5),(8),(b), 3004(a), 42 U.S.C. §§ 6902(a)(1),(4),(5),(8),(b), 6924(a).

options. So long as petitioner's members can comply with those options, petitioner can be confident that as EPA's rules make alternative waste management options legally unacceptable or economically impractical, the rules will stimulate market demand for its members' services. *See* Pet. App. 9a n.1. Petitioner's complaint in this Court stems from this economic agenda, not from any threatened environmental injury to itself or its members.[5] According to petitioner, its members suffered injury when EPA failed to impose more comprehensive regulations on waste management alternatives because the continued availability of these alternatives diminishes the market for petitioner's members' services. Pet. 7. Petitioner objects to the exclusion of this economic injury from the "zone of interests" protected by RCRA.

B. The rules challenged by petitioner in No. 86-1143 below prohibited the burning of hazardous waste fuels and "off-specification" used oil fuels in non-industrial boilers and imposed administrative controls on fuel marketers and burners. 50 Fed. Reg. 49164 (Nov. 29, 1985). Petitioner challenged three specific provisions of the rules. The Court of Appeals found petitioner had standing to present those claims (Pet. App. 8a-9a, 16a-18a), but rejected them on the merits (Pet. App. 21a-27a). Another challenge was dismissed under a settled rule of the District of Columbia Circuit that § 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1), establishes exclusive review in the District of Columbia

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[5] The Court of Appeals in No. 86-1143 perceived no standing barrier to petitioner's presentation of three claims of threatened environmental injury to its members stemming from agency unlawfulness in the present rules. Those claims were rejected on the merits. *See* Pet. App. 7a, 8a-9a, 16a-18a.

Circuit only for claims that EPA rules actually adopted are invalid, not that an otherwise valid rule should have extended farther or that EPA should have adopted some other rule (Pet. App. 19a-20a). *See United Technologies Corp. v. EPA*, 821 F.2d 714, 721 (D.C. Cir. 1987).

This petition for certiorari concerns the fifth of petitioner's challenges below. Petitioner objected to a statement in the *Federal Register* preamble that accompanied the final rules in which EPA restated its five-year old interpretation of a 1980 amendment to RCRA sponsored by Rep. Bevill. EPA was responding to a question raised in the public comments seeking clarification of the regulatory status of ash residues from burning hazardous waste or used oil for energy recovery. EPA explained that under its existing rules, ash residues that exhibit a hazard characteristic as defined in EPA's rules (40 C.F.R. §§ 261.20-261.24) or that result from burning a hazardous waste listed in EPA's rules (40 C.F.R. §§ 261.30-261.33) are considered to be hazardous wastes subject to Subtitle C regulation. However, according to EPA, the effect of the Bevill Amendment is to exclude from Subtitle C regulation ash residues derived primarily from fossil fuel combustion.[6] EPA pointed to its 1981 construc-

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[6] The Bevill Amendment precludes EPA from imposing any Subtitle C regulatory requirements on wastes from fossil fuel burning utility boilers, certain mining operations, and cement kilns until EPA completes a study of those wastes, reports its findings to Congress, and makes a regulatory determination based on the study and public hearings. RCRA §§ 3001(b)(3), 8002(f),(n)-(p), 42 U.S.C. §§ 6921(b)(3), 6982(f),(n)-(p); *see Environmental Defense Fund v. EPA*, 852 F.2d 1309, 1311 (D.C. Cir. 1988).

tion of the amendment (adopted shortly after the amendment's enactment) in which it stated that the waste materials embraced by the terms of the statutory exclusion—"[f]ly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated *primarily* from the combustion of coal or other fossil fuels"[7]—include ash residues resulting from combustion of coal, oil or natural gas, a combination of those fuels, and mixtures of coal and other fuels, including hazardous waste or used oil, if coal constitutes more than 50 percent of the fuel mixture.[8] 50 Fed. Reg. at 49190. EPA confirmed similar constructions of the Bevill Amendment clauses applicable to mining and cement kiln wastes. *Id.* at 49190 n.89.

Petitioner objected to the breadth of EPA's interpretation of the exclusion because the ash from utility boilers, mining furnaces and cement kilns need not be managed in hazardous waste facilities, while the incinerator ash generated by two of petitioner's members do not qualify for the Bevill exclusion and hence must be managed in hazardous waste facilities at substantially higher cost (Pet. App. 7a).[9] The substance

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[7] RCRA § 3001(b)(3)(A)(i), 42 U.S.C. § 6921(b)(3)(A)(i) (emphasis added).

[8] This construction had been announced in a regulatory interpretive letter (*see* 50 Fed. Reg. at 49190 n.87) and applied both to the statutory exclusion as well as EPA's implementing regulation (40 C.F.R. § 261.4(b)(4)).

[9] Petitioner's argument below was not that its members are subject to overregulation, but that the beneficiaries of the Bevill Amendment exclusions are underregulated (Pet. App. 2a, 5a, 14a).

of petitioner's claimed injury was unfair competition.[10]

The Court of Appeals, relying on *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), held that petitioner's claim of competitive injury is not within the zone of interests to be protected or regulated by RCRA (Pet. App. 9a-16a). Although the court acknowledged that Congress intended to encourage proper disposal and recycling, the court declined to equate this environmental goal with an intent to benefit recycling and disposal firms (Pet. App. 11a). The court perceived no more than a marginal relationship between the economic well-being of these firms and the statute's environmental goals (Pet. App. 11a). In the absence of evidence that Congress intended to improve the competitive position of these firms or to rely on them to challenge the agency's actions, the court feared that the statute's environmental goals could be thwarted if the court were to set aside agency action at the behest of a party whose interests "coincide only accidentally" with Congress' environmental purposes (Pet. App. 11a-12). Accordingly, the court dismissed petitioner's Bevill Amendment challenge for lack of prudential standing (Pet. App. 27a).[11]

ARGUMENT

Two Terms ago, this Court in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), reexamined the

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[10] The utility industry respondents submitted an affidavit below denying the existence of any competition between electric utilities and petitioner's members. Utilities are not in the business of managing hazardous wastes generated by third parties.

[11] Petitioner's suggestion that the Court of Appeals rehear the issue en banc was denied on December 20, 1988 (Pet. App. 29a).

doctrine of prudential standing under the Administrative Procedure Act ("APA") and provided fresh guidance on the proper application of that doctrine in the light of the APA's generous review provisions. The Court of Appeals in No. 86-1143 below, in an exceptionally detailed application of the *Clarke* rationale, determined that petitioner had standing to challenge three aspects of EPA's rules based on alleged environmental injury, but ruled that petitioner lacked standing to challenge the agency's Bevill Amendment interpretation because its only claim of injury was competitive injury. Notwithstanding petitioner's repeated charge that the Court of Appeals fashioned a new standing test of its own, we submit that the court below correctly applied *Clarke* when it barred petitioner from asserting competitive interests only marginally related to the environmental goals of RCRA. Plenary reconsideration of the prudential standing doctrine by this Court so soon after *Clarke* is not warranted.

1. Petitioner misreads *Clarke* when it accuses the Court of Appeals of applying its own test for prudential standing in lieu of the test announced in *Clarke*. According to petitioner, it is entitled to standing if its "interests bear a 'plausible relationship to the policies underlying' the relevant statute." Pet. 11 (footnote omitted). While the degree of relationship between petitioner's interest and the policies underlying the relevant statute obviously bears on the inquiry, petitioner has ignored the Court's language which defines the object and scope of the inquiry. It is that language which demonstrates that the Court of Appeals faithfully applied *Clarke* when it dismissed petitioner's challenge to EPA's Bevill Amendment

interpretation for lack of prudential standing. *See* Pet. App. 10a-11a.

The Court stated in *Clarke* that "[t]he essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.' " 479 U.S. at 399, quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984). As an inquiry into congressional intent, "all indicators helpful in discerning that intent must be weighed." *Id.* at 400. Applying the relevant indicators of congressional intent, the Court of Appeals found no evidence that Congress intended to rely on the high tech waste treatment firms to challenge the agency's actions when the only claimed injury is a failure by EPA to stimulate greater demand for those firms' services (Pet. App. 12a-14a).

The Court of Appeals acknowledged that the test for prudential standing in the light of *Clarke* is not an especially demanding one, and it was sensitive to this Court's rejection of a line of District of Columbia Circuit cases which had equated prudential standing with evidence of congressional intent to benefit the party seeking judicial review (Pet. App. 10a & n.2). The court noted that the *Clarke* test denies a right of review where the interests of the party seeking review and the statutory purpose are only marginally related or inconsistent with each other. When the court spoke in terms of an "indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect" (Pet. App. 11a), it was simply looking for signs that Congress intended to rely on a particular party to challenge agency unlawfulness. *See Clarke*, 479 U.S. at 399; *see also id.* at 400.

While the court below agreed with petitioner's claim that RCRA's aim is "to encourage proper disposal and recycling of hazardous wastes," that fact neither indicates an intent to benefit the firms that provide such services nor that their interests are more than marginally related to RCRA's environmental goals (Pet. App. 11a). Indeed, the court perceived a risk that petitioner's economic goals may thwart the statute's environmental goals and provided examples where increased regulation at the behest of commercial waste management firms could produce collateral injury to the environment (Pet. App. 11a-12a). In short, the court could find no indication of congressional intent to rely on petitioner's members as "suitable advocates of the environmental interests underlying" RCRA by virtue of the competitive advantage they secure when "the government imposed higher costs on other firms" (Pet. App. 14a).[12]

2. Petitioner asserts that RCRA establishes a policy preference for treatment and recycling over land disposal of hazardous waste, and therefore claims that Congress intended firms offering treatment and recycling services to challenge agency unlawfulness. Whether the conclusion follows from the assertion need not be decided in this case because, even if

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[12] An underlying theme of petitioner's argument is that the lower court decision in effect denies petitioner standing to participate effectively in the quasi-legislative administrative process by erecting barriers to judicial review. *See* Pet. 20, 22-25, 28-29. This is a strange argument coming from a party urging the Court to reaffirm *Clarke* because that case plainly demonstrates that access to the judicial process is subject to constitutional and statutory barriers that do not apply to participation in the administrative process. *See Clarke*, 479 U.S. at 394 & n.7, 395-96, 399.

petitioner correctly described the statutory policy, petitioner's challenge to EPA's Bevill Amendment interpretation does not champion that policy but instead frustrates it.

First, petitioner's affidavits below acknowledged that the firms purportedly injured by EPA's Bevill Amendment interpretation manage their own ash in landfills. They do not claim to recycle, reuse or treat their ash. Further, petitioner is not urging that utility ash covered by the Bevill Amendment should be recycled, reused or treated in lieu of disposal in a landfill. Indeed, EPA recently informed Congress that about 20 percent of utility ash is reused.[13]

Second, petitioner's claim of unfair competition has nothing to do with recycling, reuse or treatment as alternatives to land disposal. The waste-derived fuels at issue undergo "treatment" (*see* 40 C.F.R. § 260.10) whether they are burned in utility boilers or treatment company incinerators (although in the case of utility boilers, the Bevill Amendment interpretation makes it possible for utilities to recover the energy value in the fuel, an appropriate form of recycling).[14] The effect of overturning EPA's interpretation of the Bevill Amendment would be to frustrate the statutory

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[13] *See* EPA, REPORT TO CONGRESS, WASTES FROM THE COMBUSTION OF COAL BY ELECTRIC UTILITY POWER PLANTS, at ES-2 (Mar. 8, 1988), 134 CONG. REC. H827 (daily ed. Mar. 10, 1988) (Exec. Commun. No. 3113), 134 CONG. REC. S2686 (daily ed. Mar. 21, 1988) (Exec. Commun. No. 2810). In the same report, EPA stated that utility ash does not warrant hazardous waste regulation. *Id.* at 7-11. Hence, the statutory policy favoring treatment over land disposal of *hazardous waste* is irrelevant to nonhazardous utility ash.

[14] *See* 40 C.F.R. §§ 266.30-266.35, 266.40-266.44 (1988).

aim of RCRA by making it virtually impossible for utilities to recycle these waste-derived fuels by burning them in utility boilers.[15] These materials then would enter the nation's waste stream and perhaps be transported to one of the waste incinerators operated by petitioner's members. While petitioner purports to champion the cause of recycling, in fact its challenge would increase the volume of wastes at the expense of recycling, plainly contrary to the statute's preference for recycling and reuse over waste generation.[16] *See Clarke*, 479 U.S. at 397 n.12 (" 'zone of interest' inquiry . . . seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives").

Petitioner complains that the ash its members generate from combustion in hazardous waste incinerators must be managed in hazardous waste landfills at much higher cost than utilities incur when they manage coal combustion ash in solid waste units. But significantly, petitioner does not claim that its members' incinerator ash is not properly subject to hazardous waste regulation. Petitioner seeks uniformity of regulatory treatment for all ash residues at the most stringent level of regulation even if the ash

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[15] Utilities could not burn waste-derived fuels with coal to generate electric power if the effect were to "contaminate" in a regulatory sense the large volumes of ash residues that would then require management as hazardous wastes.

[16] *See* RCRA § 1003(a)(6), 42 U.S.C. § 6902(a)(6) ("The objectives of this Act are to promote the protection of health and the environment and to conserve valuable material and energy resources by . . . minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment").

residues are not the same. *See* note 9 *supra*. There is no question that were petitioner's members to generate ash "primarily from the combustion of coal or other fossil fuels,"[17] they, like utilities, would qualify for the alternative administrative procedures of the Bevill Amendment. The claim of "unfair competition" accordingly is incompatible with the congressional judgment in RCRA that ash derived primarily from coal should be managed differently than other ash residues. Even petitioner conceded in the Court of Appeals that restricting competition and protecting economic interests are not among RCRA's aims.[18]

Petitioner's challenge is essentially a frontal assault on the Bevill Amendment's aim that EPA be prohibited from imposing its stringent hazardous waste rules on existing management practices associated with the wastes from fossil fuel combustion before EPA completes its study of the environmental and economic consequences of these and alternative practices and determines whether existing regulatory controls are adequate to protect the environment.[19] Petitioner's challenge seeks fundamental changes in long-standing and well-known utility combustion waste management practices before EPA completes the administrative process for determining whether hazardous waste regulation of those practices is necessary.[20] The end re-

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[17] RCRA § 3001(b)(3)(A)(i), 42 U.S.C. § 6921(b)(3)(A)(i).

[18] *See* Petitioner's Supplemental Brief below at 10 n.4.

[19] *See* RCRA §§ 3001(b)(3)(A)(i), 3001(b)(3)(C), 8002(n), 42 U.S.C. §§ 6921(b)(3)(A)(i), 6921(b)(3)(C), 6982(n).

[20] As previously noted, EPA has submitted its report to Congress (*see* note 13 *supra*), but the regulatory determination required by § 3001(b)(3)(C), 42 U.S.C. § 6921(b)(3)(C), has not yet been issued.

sult of the Bevill Amendment procedure is a factually-based determination on the proper way to protect the environment, commensurate with any risks found to exist, but also taking account of other important energy policy interests.[21] To allow petitioner to interfere with that process before it is completed for the sake of its members' entrepreneurial interests would plainly "frustrate [rather] than . . . further statutory objectives." *Clarke*, 479 U.S. at 397 n.12. Accordingly, "it cannot reasonably be assumed that Congress intended to permit [this] suit." *Id.* at 399; *cf. Block v. Community Nutrition Inst.*, 467 U.S. 340, 347-48 (1984).

3. Petitioner's request that this Court review the Court of Appeals' determination on prudential standing in No. 86-1143 is virtually a request for an advisory opinion on the law of standing. In the event of a remand, petitioner's challenge to EPA's Bevill Amendment interpretation faces almost certain dismissal for want of jurisdiction for the same reason that the lower court dismissed petitioner's challenge to EPA's failure to regulate used oil generators, transporters, and storage and blending facilities.[22] The court held that a challenge to an agency's failure to regulate more comprehensively is not reviewable in the Court of Appeals under § 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1), because it is not a challenge to the lawfulness of rules actually adopted unless those rules foreclose more comprehensive regulation in the

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[21] *See* RCRA §§ 3001(b)(3)(C), 8002(n), 42 U.S.C. §§ 6921(b)(3)(C), 6982(n); *Environmental Defense Fund v. EPA*, 852 F.2d 1309, 1315 (D.C. Cir. 1988).

[22] The court below did not reach the jurisdictional question in the context of petitioner's Bevill Amendment challenge because its ruling on standing fully disposed of that portion of the case.

future.[23] Petitioner has not sought review of that ruling in this Court and hence it is now the law of this case[24] as well as the settled law of the District of Columbia Circuit.[25]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[23] In some circumstances, such a claim may be brought in the district courts. Pet. App. 20a.

[24] *See, e.g., Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

[25] *See United Technologies Corp. v. EPA*, 821 F.2d 714, 721 (D.C. Cir. 1987).